

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK EDMUND KOKOWICZ,

Defendant-Appellant.

UNPUBLISHED

May 12, 2005

No. 253180

Macomb Circuit Court

LC No. 03-001498-FC

Before: Judges O’Connell, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of solicitation to commit murder, MCL 750.157b(2), and two counts of witness intimidation (threaten to kill), MCL 750.122(7)(c). Defendant was sentenced to two terms of eighteen years and nine months to twenty-five years in prison for the solicitation to commit murder convictions and nine years and eleven months to fifteen years in prison for the witness intimidation (threaten to kill) convictions. We affirm defendant’s convictions, but remand for correction of defendant’s sentences for solicitation of murder.

Defendant first argues that the trial court violated his due process right to an impartial jury by permitting the jurors to submit questions for witnesses during the trial. We disagree. Because defendant did not object to either the instruction that allowed the jurors to ask questions or to any specific questions submitted by the jury, this issue is unpreserved. We review unpreserved issues for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

A defendant claiming that the trial court erred in permitting jurors to submit questions must show that the trial court abused its discretion. *People v Heard*, 388 Mich 182, 187-188; 200 NW2d 73 (1972). Here, the court instructed the jurors that they may submit questions in writing after both parties questioned each witness. The trial court told the jurors that it would review each question for compliance with evidentiary rules before asking the question. See CJI2d 2.9. Defendant does not argue that the trial court abused its discretion, but instead contends that the practice itself constitutes structural error warranting reversal irrespective of prejudice. There is no merit to this argument. Properly screened questions from the jury enhance the purpose of the trial because they allow the factfinder to render a verdict based on clarified information. *Heard, supra* at 187-188; *People v Stout*, 116 Mich App 726, 733; 323 NW2d 532 (1982). Defendant failed to show any error because the questions were properly

screened and our review of the questions reveals that they did not reflect juror bias or prejudice. See *Heard*, *supra* at 188; *Stout*, *supra* at 733.

Defendant next contends that he received ineffective assistance of counsel. We disagree. Whether a defendant has been denied effective assistance of counsel is a mixed question of law and fact. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). A judge must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to the effective assistance of counsel. *Id.* This Court reviews a trial court's factual findings for clear error and reviews its constitutional determinations de novo. *Id.* at 484-485. Because defendant did not move for an evidentiary hearing or a new trial with regard to his claim, our review is limited to mistakes apparent on the record. *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004).

To prove ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *Grant*, *supra* at 485-486, citing *Strickland v Washington*, 466 US 668, 689, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Strickland*, *supra* at 694. The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant asserts that defense counsel was ineffective because he failed to object to four instances of hearsay during Sergeant Brian Kozlowski's testimony. This argument has no merit because none of the challenged statements were hearsay. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). None of the statements were offered to prove the truth of what was asserted. They were offered to explain how Kozlowski became involved in the case, why he was able to visit defendant, why the informant gave information to the police, and how deeply the informant was involved in setting up the solicitations of murder.

In any case, even if the statements were hearsay, defense counsel did not object to them as a matter of trial strategy. Defendant's theory was that he had been set up by the informant, and all of the challenged statements support that theory. A defense counsel's trial strategy is not ineffective simply because using it did not work. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Defendant has not overcome the strong presumption that counsel's performance constituted effective assistance. *Solmonson*, *supra* at 663.

Finally, defendant correctly asserts that the trial court violated the two-thirds rule set out in *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972), when it sentenced defendant to two terms of eighteen years and nine months to twenty-five years in prison for the solicitation of murder convictions. Therefore, we remand to the trial court for the perfunctory task of reducing defendant's minimum sentences on the solicitation of murder convictions to sixteen years and eight months. *People v Thomas*, 447 Mich 390, 394; 523 NW2d 215 (1994).

Affirmed, but case is remanded for reduction of defendant's solicitation of murder sentences by twenty-five months. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ Jane E. Markey

/s/ Michael J. Talbot